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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDY GILBERTO CRUZ,

Defendant and Appellant.

H046055 & H046794

(Monterey County

Super. Ct. Nos. 18CR004444,
17CR004149)

Defendant Freddy Gilberto Cruz appeals from a judgment sentencing him to three years in county jail as part of a negotiated disposition of two cases. He argues that the trial court violated his federal constitutional right to due process by imposing fines and fees without first assessing his ability to pay (citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*)). He also asks that the abstract of judgment be corrected to conform to the trial court's oral pronouncement of judgment regarding a parole revocation fine. We will order that the abstract of judgment be modified to conform to the trial court's oral pronouncement, and affirm the judgment as modified.

I. TRIAL COURT PROCEEDINGS

This case involves two felony complaints. (The underlying facts are not relevant to the appellate issues.) Defendant was charged in the first case (the theft case) with unlawfully taking or driving a vehicle (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496d; unspecified references are to this Code). The complaint alleged that defendant had two prior Vehicle Code section 10851 convictions (§ 666.5,

subd. (a)) and had served two prior prison terms (§ 667.5, subd. (b)). In a negotiated disposition, defendant pleaded no contest to the vehicle theft count and admitted the prior vehicle theft conviction allegations. Imposition of sentence was suspended, the second count was dismissed, the prior prison term enhancements were stricken, and defendant was placed on formal probation. The court imposed the following fines, fees, and costs: a \$300 restitution fine (§ 1202.4, subd. (b)(1)), a suspended \$300 probation revocation fine (§ 1202.44), a \$40 court operations assessment (§ 1465.8), a \$30 court facilities funding assessment (Gov. Code, § 70373), a \$4 emergency medical air transportation fee (Gov. Code, § 76000.10), \$864 for probation report preparation, and \$81 per month for probation supervision.

Defendant was arrested about a month later for, among other things, failing to report to probation immediately upon his release from custody and admitting he had used alcohol and cocaine while on probation. Defendant was charged in a second case (the possession case) with possessing marijuana while in custody at the Monterey County Jail (§ 4573.6, subd. (a)). The new complaint again alleged defendant had served two prior prison terms (§ 667.5, subd. (b)), and also alleged defendant was on bail in the theft case when he committed the possession offense (§ 12022.1, subd. (b)). In a negotiated disposition, defendant pleaded no contest to the possession count. The trial court imposed a three-year stipulated jail sentence, calculated as follows: a principal term of two years in the possession case for the possession count (§ 4573.6, subd. (a)), plus a consecutive one-year term in the theft case for the vehicle theft conviction (§§ 666.5, subd. (a), 1170.1, subd. (a); Veh. Code, § 10851). The trial court imposed the following fines and fees in the possession case: a \$600 restitution fine (§ 1202.4, subd. (b)(1)), a \$40 court operations assessment (§ 1465.8), and a \$30 court facilities funding assessment (Gov. Code, § 70373). (There is a discrepancy in the record as to whether the trial court imposed a suspended parole revocation fine (§ 1202.45), which we will discuss in Part II.B.) The trial court struck the prior prison term allegations, and the on-bail

enhancement was dismissed because the prosecutor acknowledged it did not factually apply to defendant's case.

Defendant timely appealed, leading to case No. H046055. While that appeal was pending, defendant's appellate counsel filed a request in the trial court to strike various fines and fees based on the reasoning of *Dueñas*. The trial court denied that request by written order, leading to a second appeal (case No. H046794). We ordered the cases considered together.

II. DISCUSSION

Based on *Dueñas*, defendant argues his federal constitutional right to due process was violated when fines and fees were imposed without determining that he would be able to pay them. He also argues the abstract of judgment must be modified to correct a clerical error related to a parole revocation fine. The People argue that we should not consider defendant's argument on the merits because he forfeited the challenge by failing to object; because he waived his right to appeal by initialing appeal waivers on the change of plea forms he signed in each case; and because he failed to satisfy section 1237.2 (regarding appeals when the only alleged error is one in the imposition and calculation of fines or fees). As to the merits, the People argue *Dueñas* was wrongly decided. They also advance an argument related to the Eighth Amendment's excessive fines clause.

Defendant complied with section 1237.2 by seeking relief in the trial court. We decline to review the fines under the People's Eighth Amendment theory because it was not raised by defendant in his opening brief and only cursorily discussed in his reply. We will analyze the fines and fees issue on the merits based on the due process argument defendant briefed.

A. NO DUE PROCESS VIOLATION

As summarized by another opinion, *Dueñas* held that “ ‘due process of law requires [a] trial court to ... ascertain a defendant's present ability to pay before it

imposes’ (1) ‘court facilities and court operations assessments’ [citations], or (2) a restitution fine.” (See *People v. Hicks* (2019) 40 Cal.App.5th 320, 325, review granted November 26, 2019, S258946 (*Hicks*).) But a growing number of appellate authorities have concluded that *Dueñas* was wrongly decided. As a two-justice decision from another panel of this court recently observed, *Dueñas*’s conclusion that due process compels an ability to pay determination in every case “is not supported by the authorities it cited and is inconsistent with due process jurisprudence.” (*People v. Adams* (2020) 44 Cal.App.5th 828, 832; accord *People v. Petri* (2020) 45 Cal.App.5th 82; *Hicks*, *supra*, 40 Cal.App.5th at p. 329, rev. granted; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060; *People v. Allen* (2019) 41 Cal.App.5th 312, 326–328.) We find those authorities persuasive and agree that *Dueñas* was wrongly decided. As defendant’s appellate argument is based entirely on *Dueñas* and opinions adopting its reasoning, we conclude defendant has not demonstrated error in the trial court’s consideration of his financial circumstances or imposition of fines and fees.

B. PAROLE REVOCATION FINES

Defendant argues the abstract of judgment contains a clerical error in the form of a \$600 suspended parole revocation fine (§ 1202.45) that the trial court did not actually impose. We also note that the abstract of judgment includes a \$300 suspended parole revocation fine for the theft case, and omits a \$300 probation revocation fine for that case.

It is clear the trial court imposed a \$600 restitution fine in the possession case (§ 1202.4, subd. (b)). As for suspending a parole revocation fine in the same amount (§ 1202.45), the probation officer at the sentencing hearing proposed deleting the paragraph from the probation report recommending the suspended fine because defendant “won’t be on parole.” The trial court apparently agreed to do so, because that paragraph in the probation report has been crossed out. When the trial court orally imposed sentence, it did not mention a \$600 suspended parole revocation fine. But contrary to the

trial court's oral pronouncement, the abstract of judgment includes a \$600 parole revocation fine associated with the possession case. Regarding the theft case, the trial court stated as follows: "Defendant is ordered to pay the previously ordered or suspended fines and fees in addition to any outstanding balance on the state restitution fine of \$300 to [R]evenue. There is an additional restitution fine of \$300 that was also ordered."

Section 1202.45 requires a trial court to impose and then suspend a "restitution fine in the same amount as that imposed" under section 1202.4 if a defendant's sentence will include a period of parole, postrelease community supervision, or mandatory supervision. (§ 1202.45, subds. (a), (b).) If, as here, a defendant receives a county jail sentence (§ 1170, subd. (h)) with no postcustodial mandatory supervision, section 1202.45 does not apply and no fine should be imposed. (*People v. Butler* (2016) 243 Cal.App.4th 1346, 1352.) The trial court was therefore correct in accepting the probation officer's correction in the possession case, and the abstract of judgment must be modified to effectuate the trial court's oral pronouncement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The same reasoning precludes imposition of the section 1202.45 fine in the theft case, and the judgment must be modified to delete that fine. However, the abstract of judgment must also be modified to add the previously suspended \$300 *probation* revocation fine (§ 1202.44) which was revived when defendant's probation in the theft case was revoked and not reinstated.

III. DISPOSITION

The judgment is modified to delete the \$600 suspended parole revocation fine (Pen. Code, § 1202.45) in the possession case (case No. 18CR004444); to delete the \$300 suspended parole revocation fine (Pen. Code, § 1202.45) in the theft case (case No. 17CR004149); and to add the \$300 probation revocation fine (Pen. Code, § 1202.44) in the theft case (case No. 17CR004149). The superior court is directed to prepare a new abstract of judgment to reflect those changes. As so modified, the judgment is affirmed.

Grover, J.

I CONCUR:

Danner, J.

Greenwood, P.J., Dissenting:

I respectfully dissent because I continue to be persuaded by the reasoning in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, and thus conclude that the trial court violated appellant's federal constitutional right to due process by imposing fines and fees without first assessing his ability to pay them. (See *People v. Santos* (2019) 38 Cal.App.5th 923.)

Greenwood, P.J.

People v. Cruz
Nos. H046055, H046794